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SEP 28 1964
JOHN F. DAVIS, CLERK

No. 377

In the Supreme Court of the United States

OCTOBER TERM, 1964

ROCKWELL MANUFACTURING CO., KEARNEY DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-23) is reported at 330 F. 2d 795. The Board's decision and order (J.A. 123-154, 157-159)[1] are reported at 142 NLRB 741. The Board's decision in the underlying

[1] "J.A." references are to those portions of the record printed in a Joint Appendix for the use of the court below and filed with the petition.

representation proceeding (J.A. 120-122) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. 13) was entered on March 31, 1964, and on May 19, 1964 the Court denied petitions for rehearing and rehearing *en banc* (Pet. 24-25). The petition for a writ of certiorari was filed on August 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer is entitled to a formal hearing on his objections to a representation election where the Board found that such objections fail to raise any substantial and material issues of law or fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth in the petition (Pet. 3-4).

STATEMENT

On March 6, 1962, the Company and the Union[2] entered into a Consent Election Agreement, which was subsequently approved by the Board's Regional Director, covering a representation election among

[2] United Steelworkers of America, AFL-CIO.

the production and maintenance employees at the Company's Kearney, Nebraska plant (J.A. 14-17). The election was held on March 21, 1962, and the Union prevailed by a vote of 50 to 49 (J.A. 125; 19). After the election, the Company made the following timely objections (J.A. 19-20):

> 1. On two occasions prior to the election an employee was threatened in the presence of other employees with the words, "I'm going to get you."
>
> 2. Prior to the election employees were instructed by the "union organizer on how to make and use paint bombs in the event of a strike to indicate what would happen to those who would not join a union."
>
> 3. One employee was threatened with bodily harm, if he did not sign a union authorization card.
>
> 4. At a meeting sponsored by the employees opposing the Petitioner [the Union] the employees who did not join the Petitioner were threatened with bodily harm if the Petitioner won the election.
>
> 5. At a meeting of the Petitioner prior to the election the Petitioner's representative suggested the use of force to enlist employees as members.

After considering the supporting evidence presented by the Company and interviewing and taking sworn statements from the witnesses it named (J.A. 20), the Regional Director overruled all the objections (J.A. 19-25). He found Objections 3 and 5 without merit because they were based on events which occurred before the execution of the Consent Election

Agreement (J.A. 23-24), and under a Board rule then in force (see p. 7, n. 6, *infra*) only conduct occuring after the execution date of such an agreement would be considered in deciding whether to set aside an election, *Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118.

The Regional Director ruled that the allegation in Objection 1 was insufficient as a matter of law, since the employee who made the threat was merely a Union adherent and there was no indication that the Union had authorized or ratified his conduct (J.A. 20-21). *Bronze Alloys Co.*, 120 NLRB 682, 684. No evidence was found to support Objection 4 (J.A. 23). Finally, with respect to Objection 2, the Regional Director found that all the witnesses agreed that the organizer discussed the matter of paint bombs in response to questions from employees as to what they were, but, at the same time, cautioned the employees against using them or engaging in any other violence. The Regional Director concluded that in these circumstances the organizer's statements about paint bombs did not render impossible the employees' free choice in the election (J.A. 22-23).

The Company filed exceptions to the Regional Director's Report (J.A. 25-30). None of the exceptions to his disposition of Objections 2 and 4 referred to any evidence in conflict with or in addition to that relied on by him (J.A. 27-28, 29). The Board held that the exceptions failed to raise any material and substantial issues of law or fact, adopted the Regional Director's Report overruling the objections and certified the Union (J.A. 120-122).

The Company then refused to bargain with the Union and made unilateral changes in wages and other benefits without notifying the Union. The latter filed charges alleging that the Company thereby violated Section 8(a)(5) of the Act. (J.A. 126-127; 32, 44, 116-119.) During the unfair labor practice hearing, the Company sought to relitigate the validity of the Board's certification, reiterating its previous objections to the election. It also offered to prove another pre-election incident, but did not contend that evidence thereof was not available at the time it made its objections to the election (J.A. 143-145; 119-120). The Board, following its usual practice of not permitting relitigation in the unfair labor practice proceeding of issues which were or could have been litigated in the representation proceeding, rejected the new contention as untimely and the remaining contentions as raising only issues which previously had been adjudicated. The Board held that the Company violated Section 8(a)(5) of the Act by refusing to bargain with the Union. (J.A. 145-146, 153-154, 157-158.) The Board's order requires the Company to cease and desist the violations, and to bargain with the Union upon request (J.A. 148-150, 154).

The court of appeals (Swygert, J., dissenting) enforced the Board's order in full (Pet. 13-23).[3]

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[3] The Board also had found that the Company had committed separate violations of Section 8(a)(1) of the Act (J.A. 127-143, 148, 153-154). This finding was not challenged in the court below.

ARGUMENT

Contrary to petitioner's contention (Pet. 10-11, Supplemental Memorandum 2-3), this case presents no broad general issue concerning the right of an employer to an evidentiary hearing upon objections to the conduct of a Board representation election. The Board's Rules and Regulations explicitly provide for a hearing upon exceptions to a Regional Director's report on objections to an election "if it appears to the Board that such exceptions raise substantial and material factual issues" (29 C.F.R. 102.69(e)), and the Board frequently conducts hearings upon challenges to elections.[4] The narrow issue here is whether the Regional Director, the Board and the court of appeals correctly ruled that the particular incidents upon which petitioner relied in urging that the election be set aside did not raise substantial material factual issues whose resolution required a hearing.[5] There is no occasion for further review of that question.

1. Under the Board's Rules and Regulations, objections to an election are investigated by the Regional Director (29 C.F.R. 102.69(c)). In the pres-

[4] For some recent instances, see *Jay's Foods Inc.*, 148 NLRB No. 34; *U.S. Rubber Co.*, 147 NLRB No. 84; *Gimbel Bros. Inc.*, 147 NLRB No. 62.

[5] Petitioner does not appear to challenge the factual premises upon which the Regional Director and the Board proceded. Nor does it directly challenge, at least at this time (see Pet. 2, n. 2), the Board's conclusion that the conduct alleged in the objections was insufficient to warrant setting the election aside.

ent case the Regional Director, after an investigation in which he interviewed all the witnesses named by the Company, concluded that none of the incidents upon which the Company relied provided a legally sufficient basis for setting aside the election, and the Board adopted his conclusions. These rulings were fully warranted. As set forth in the Statement, two of the objections (3 and 5) were based on events which occurred before the execution of the Consent Election Agreement and which, under the Board rule then in effect, could not serve as a basis for impeaching the election.[6] No evidence was presented to support Objection 4. The Regional Director's investigation of Objections 1 and 2 disclosed that the undisputed evidence obtained from sources designated by petitioner did not make out a *prima facie* case of interference warranting a setting aside of the election.[7]

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[6] This rule, enunciated in *Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118, is a permissible exercise of the broad discretion which the Act confers upon the Board to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" (*National Labor Relations Board* v. *Tower Co.*, 329 U.S. 324, 330). The Board subsequently modified this rule, to take into account conduct occuring between the time the representation petition is filed and the Consent Agreement is executed. *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455. As the court below concluded (Pet. 18-19), it was likewise a permissible exercise of the Board's discretion to confine application of the modified rule to petitions filed after September 17, 1962 (which excluded the instant petition, which was filed on February 19, 1962, J.A. 125).

[7] There was no showing that the threat covered by Objection 1 was chargeable to the Union, or that it gen-

The Board was not required to hold an evidentiary hearing to enable petitioner to introduce formal proof of allegations which were legally insufficient to justify the relief it sought. "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" (*National Labor Relations Board* v. *Tower Co.*, 329 U.S. 324, 330). The Board has properly exercised that discretion in declining to conduct evidentiary hearings on objections to the conduct of representation elections which do not "raise substantial and material factual issues" — i.e., ones which, even if resolved in favor of the company, would not require the election to be set aside. For neither the Constitution nor the Act requires a hearing where there are no material disputed factual

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erated a general atmosphere of fear. As to the paint bomb incident, covered by Objection 2, the evidence indicated that the Union agent had merely been responding to a question raised by the employees and had then gone on to caution them against engaging in violence. See p. 4 *supra*. "In order to be entitled to a hearing on its objections to an election, an objecting party must supply the Board with specific evidence which *prima facie* would warrant setting aside the election." *National Labor Relations Board* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 75 (C.A. 5). It should also be noted that, in its offer of proof in the unfair labor practice hearing (J.A. 119), petitioner alleged that the incident upon which Objection 2 was based occurred on February 22, 1962, before the consent agreement was executed; thus, the Board could have rejected this objection on the additional ground that it was barred under the then applicable *Goodyear* rule, p. 7 n. 6, *supra*.

issues.[8] The Board's practice is analogous to the granting of summary judgment where "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law" (Rule 56(c), Federal Rules of Civil Procedure).

2. The decision below that petitioner had not presented any material factual allegations requiring a hearing is not, as petitioner contends (Pet. 8-10), in conflict with *National Labor Relations Board* v. *Lord Baltimore Press*, 300 F. 2d 671 (C.A. 4), *National Labor Relations Board* v. *Poinsett Lumber and Mfg. Co.*, 221 F.2d 121 (C.A. 4) or *National Labor Relations Board* v. *Dallas City Packing Co.*, 230 F. 2d 708 (C.A. 5). None of the latter cases enunciates any general rule that the Board always must conduct an evidentiary hearing when the conduct of an election is challenged. On the contrary, they held only that the particular challenges in those cases raised substantial material factual questions about the election which required a hearing. In the present case, however, the court of appeals held that the Board properly concluded that an evidentiary hearing was not required because petitioners raised no material factual issues. The differing evaluations by different courts of appeals of the materiality of different factual challenges to an election present no conflict of decisions requiring resolution by this Court.

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[8] See *National Labor Relations Board* v. *Air Control Products of St. Petersburg*, (C.A. 5), July 28, 1964, 56 LRRM 2904, 2906; *National Labor Relations Board* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 75 (C.A. 5); *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

3. The question in the present case is quite different from the issues cited by petitioner (Supplemental Memorandum) upon which the government recently acquiesced in certiorari in *United Air Lines, Inc.* v. *National Mediation Board*, No. 139, this Term, and filed a petition in *National Mediation Board* v. *Association for the Benefit of Non-Contract Employees*, No. 369, this Term. Those issues are whether, in a representation proceeding before the National Mediation Board, a carrier has standing to challenge the form of ballot to be used, and the carrier or a group of employees opposed to representation are entitled to be heard on what would constitute an appropriate bargaining unit. The National Mediation Board is of the view that only the labor organizations seeking to be certified are entitled to be heard on these matters. As we have shown, however, an employer like petitioner has standing to participate in a representation proceeding before the National Labor Relations Board, and to be heard on its contentions, whether they relate to the bargaining unit, the form of the ballot, or, as here, the effect of certain incidents on the reliability of the election results. The only question in this case, as we have shown, is whether an employer is entitled to an evidentiary hearing where his challenges to the conduct of an election raise no substantial material factual issues. This narrow issue is obviously of a quite different level of importance than the broad issues involved in the National Mediation Board cases, and there is no inconsistency in the government supporting review in those cases and opposing it here.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 744867 250